Comment on Recent Cases

CONSTITUTIONAL LAW: SELECTIVE DRAFT ACT.—Chief Justice White, speaking for a unanimous court, has handed down a decision upholding the Selective Draft Act of May 18, 1917. The case is entitled *Arver v. United States*,[1] that being the first of six cases on appeal. The opinion written by the Chief Justice is relatively brief, deciding the case independently of judicial authority, and citing only at the end the one important case in which the Federal draft acts of the Civil War were construed and upheld,[2] and the dozen or more cases decided in the seceding states, wherein the "conscript acts" of the Confederate States were exhaustively considered and upheld in every instance.[3] The provisions of the Confederate Constitution on war, the army, navy and militia were taken bodily from the Constitution of the United States.[4] The opinions in the cases in the seceding states are as much interpretative of one constitution as of the other. And they are in fact, as they even claim to be, commentaries upon the powers of the Congress of the United States. They are written in excellent judicial temper and are full of sound learning. They covered every contention, theory, and aspect of the subject.

The present decision had been foreshadowed in obiter dicta of such Justices as Taney, Field, Brewer and Harlan. Chief Justice Taney said in 1850, that "as commander-in-chief, he (the President) is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[5] In 1871, Justice Field described the military power of the United States as being of the amplest character. He said: "Now, among

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[1] (January 7, 1918) 38 Sup. Ct. Rep. 159.

[2] Kneedler v. Lane (1863), 45 Pa. St, 238.

[3] Ex parte Hill (1863), 38 Ala. 429; Ex parte Tate (1864), 39 Ala. 254; In re Emerson (1864), 39 Ala. 437; In re Pille (1864), 39 Ala. 459; Ex parte Bolling (1865), 39 Ala. 609; Jeffers v. Fair, (1862), 33 Ga. 347; Barber v. Irwin (1864), 34 Ga. 28; Cobb v. Stallings (1864), 34 Ga. 73; Parker v. Kaughman (1865), 34 Ga. 136; Daly and Fitzgerald v. Harris (1864), 33 Ga. Supp. 38; Simmons v. Miller (1864), 40 Miss. 19; Gatlin v. Walton (1864), 60 N. C. 205; Ex parte Coupland (1862), 26 Tex. 386; Burrounghs v. Peyton (1864), 16 Gratt. (Va.) 470.

[4] The Constitution of the United States and that of the Confederate States are printed in parallel columns in the appendix to Vol. IV of Woodrow Wilson's History of the American People.

[5] Fleming v. Page (1850), 9. How. 603, 615, 13. L. Ed. 276.

the powers assigned to the national government, is the power 'to raise and support armies' and the power to 'provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment."[6] Justice Field, again in 1878, spoke of the control of Congress over the whole subject of the formation, organization and government of the national armies as being plenary.[7] Justice Brewer, in holding that an enlisted soldier could not avoid a charge of desertion by proof that he was beyond the military age at the time of enlistment, said that the "government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service of all."[8] And Justice Harlan, in upholding a state compulsory vaccination law, generalized the compulsive power of government and said that a man "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot in its defense."[9]

Chief Justice White, in the principal case, in opening says: "As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice." But he then proceeds to consider the subject with the utmost seriousness, and concludes his argument as follows: "Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act . . . was beyond the constitutional power of Congress, is manifest."

W. C. J.

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[6] Tarble's case (1871), 13 Wall. 397, 408, 20 L. Ed. 597.
[7] Coleman v. Tennessee (1878), 97 U. S. 509, 514, 24 L. Ed. 1118.
[8] In re Grimley (1890), 137 U. S. 147, 34 L. Ed. 636, 11 Sup. Ct. 54.
[9] Jacobson v. Massachusetts (1905), 197 U. S. 11, 29, 49 L. Ed. 643, 25 Sup. Ct. 358.